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IN THE

Supreme Court of the United States

ANN VENEMAN, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF 113 AGRICULTURAL INDUSTRY ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. § 2901 et seq., and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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INTERESTS OF THE *AMICI CURIAE* [1]

Pursuant to Supreme Court Rule 37.3, the *amici curiae* submit this brief in support of the Petitioners in both *Ann Veneman, Secretary, United States Department of Agriculture, et. al. v. Livestock Marketing Association, et. al.*, No. 03-1164, and *Nebraska Cattlemen, Inc., et. al. v. Livestock Marketing Association, et. al.*, No. 03-1165.

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6, it is stated that this brief was not authored, in whole or in part, by counsel for a party. No persons or entities, other than the *amici*, contributed monetarily to the preparation and submission of this brief.

The 113 *amici curiae* consist of national and state organizations that are broadly involved in all aspects of American agriculture. (the *amici curiae* are collectively referred to as the "Associations"). The Associations represent a diverse group of individuals including American cattlemen and cattlewomen, ranchers, farmers, feeders, members of species and breed associations, and others involved in various agricultural pursuits throughout the United States. The Associations include the American Farm Bureau Federation, state farm bureaus, numerous state cattle and beef associations, organizations generally involved in the promotion of beef and other agricultural concerns, and entities involved in other agricultural industries that may be effected by the Eighth Circuit's opinion. Many of the members of the Associations directly benefit from the promotional, research, and educational activities conducted by the government pursuant to the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*, referred to as the "Beef Act"). Many others represented by the Associations benefit from agricultural marketing programs that are similar in a number of respects to the Beef Checkoff program under review in this case.

The Eighth Circuit Court of Appeals' opinion in *Livestock Mktg. Ass'n v. USDA*, 335 F.3d 711 (8th Cir. 2003), causes great concern to the Associations because of the devastating effect the opinion will have on the cattle industry—one of the oldest, largest, and most important components of America's agricultural economy.[2] The opinion also threatens to stall and possibly reverse the steady increase in beef sales and demand that has been fostered by the Beef Act and the Beef Checkoff program. Allowing the decision to stand may ultimately resume the deterioration of the American cattle industry that prompted the enactment of the Beef Act in the first place.

[2] This concern is evidenced by the participation in this brief by numerous entities outside of the beef industry.

See, e.g., Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., lst Sess. 3; 121 Cong. Rec. H31439 (1975) (stating that continuation of the downward trend in the cattle industry "would endanger not only the country's meat supply, but the entire economy").

Because the Associations and their members are intimately involved in and familiar with the beef industry and other agricultural industries, many of them will undoubtedly feel the effects of the Eighth Circuit's holding that the Beef Act contravenes the First Amendment. As Congress stated in the Beef Act's preamble, "the production of beef and beef products plays a significant role in the Nation's economy." 7 U.S.C. § 2901(a)(2). The Associations have seen first hand the positive effect the Beef Act and other commodity marketing programs have had upon American agriculture and the economy as a whole due to the promotion of the Industries through permissible avenues of government speech. Accordingly, the Associations fully support the Petitioners in this matter, and respectfully urge the Court to reverse the decision of the Eighth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

Not only does this case present the Court with issues of undeniable national importance—it also raises crucial First Amendment issues which, if upheld, threaten to eviscerate the government speech doctrine. Although the Court has, on two recent occasions, addressed the constitutionality of assessments used to fund commodity-marketing programs, neither case raised the question of whether such advertising falls within the protections of the government speech doctrine. That is the precise question presented in this case. Because the marketing provisions of the Beef Act clearly fall within the parameters of permissible government speech, the Eighth Circuit's opinion should be reversed.

In the underlying opinion, the Eighth Circuit created a broad and unfounded rule that the government speech doctrine cannot apply when a case arises from a challenge directed to the compelled funding of speech, rather than to the government's choices regarding the content of its speech. In addition to having no foundation in established First Amendment jurisprudence, the Eighth Circuit's opinion squarely conflicts with this Court's holdings concerning the parameters of the government speech doctrine. When analyzed in light of this Court's precedent, it is clear that speech pursuant to the Beef Act is based upon important goals, is controlled by the United States Department of Agriculture, addresses issues of undeniable national importance and, therefore, constitutes legitimate government speech.

In addition to ignoring the important goals accomplished by the Beef Act, the Eighth Circuit largely overlooked the fact that many of the assessments collected pursuant to the Beef Checkoff program are not used to fund advertising. Rather, many of those funds are applied to ongoing research efforts, educational programs, and other issues of undeniable national importance. In an era of heightened public awareness regarding health issues such as "Mad Cow Disease," other food-borne pathogens, and the nutritional value of beef and beef products, the Eighth Circuit's oversight proves fatal to its conclusion that the government speech doctrine is inapplicable. Because the government may unquestionably fund these important activities with assessments from cattle producers, the Eighth Circuit's opinion was overly focused on advertising and, therefore, erroneous.

In addition to improperly creating its own version of this Court's government speech doctrine, the Eighth Circuit also incorrectly applied this Court's test for commercial speech articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). In holding that advertising conducted pursuant to the Beef Act did not pass

muster under *Central Hudson*, the Eighth Circuit created its own version of the commercial speech test which purported to balance the government's interest in the Beef Act with the Respondents' First Amendment rights. That test has no basis in First Amendment jurisprudence, and it contravenes this Court's established authority. Moreover, through application of its purported test, the Eighth Circuit overlooked the substantial government interests that are furthered through advertising, research, and education conducted pursuant to the Beef Act.

Striking down the Beef Act and the Beef Checkoff program threatens to have a dramatic and devastating effect on the beef industry and the public at large. The Beef Act has fostered substantial sales and demand in the beef industry since its inception, and checkoff dollars have been used to fund important research and educational activities in addition to beef promotion. Allowing the Eighth Circuit's opinion to stand will deprive thousands of American cattlemen and other members of the Associations from continuing to reap the benefits that the Beef Act has undisputedly provided them. Moreover, the important research, consumer information, and educational activities conducted under the Beef Act, including research designed to protect Americans from serious health concerns, will either be halted entirely or will struggle to continue based only on funding from state contributions, voluntary donations, or taxpayer dollars. This Court should uphold the constitutionality of the Beef Act.

ARGUMENT

This case presents a constitutional challenge to a generic advertising campaign launched pursuant to the Beef Act. The campaign at issue, which brought us the famous "Beef, It's What's for Dinner" slogan, is funded by the beef industry pursuant to the Beef Checkoff, and disseminated under the direct supervision and control of the United States Depart-

ment of Agriculture. In addition to advertising, funds raised by the Beef Checkoff program are used in, among other things, research activities designed to ensure that American beef remains the safest in the world. *See generally http://*www.bseinfo.org (last visited July 23, 2004) (providing health information funded, in part, by the Beef Checkoff). The importance of this aspect of the Beef Act cannot be emphasized enough, given the public's heightened awareness of issues such as Bovine Spongiform Encephalopathy ("BSE"), more commonly referred to as "Mad Cow Disease," as well as other food-borne pathogens and nutritional concerns. The continued strong consumer confidence and increased beef demand in light of these issues is a testament to the Act's success and importance to the cattle industry, and is but one of many reasons the Associations consider the Beef Act and similar legislation to be necessary in order for the Nation's agricultural economy to thrive.

In the underlying opinion, the Eighth Circuit struck down the Beef Act, the Beef Order, the Beef Checkoff, and all advertising and research activities conducted thereunder, as violative of the First Amendment. In doing so, the Eighth Circuit improperly substituted its own judgment for the will of Congress. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). Moreover, the court engaged in a faulty analysis of the government speech doctrine which, if upheld, will result in the evisceration of that doctrine. Further, the court misapplied this Court's established precedent concerning the commercial speech doctrine. Accordingly, the judgment of the Eighth Circuit should be reversed.

I. THE BEEF ACT AND ACCOMPANYING BEEF CHECKOFF PROGRAM ARE CONSTITUTIONAL UNDER THE "GOVERNMENT SPEECH" DOCTRINE.

In its opinion, the Eighth Circuit noted that "[t]he government speech doctrine has firm roots in our system of jurisprudence." *Livestock Mktg Ass'n*, 335 F.3d at 719. Nevertheless, the court went on to call this fundamental aspect of First Amendment jurisprudence into question, and its opinion has cast considerable doubt upon the government's ability to take positions on important topics of national concern. This case presents not only an issue of national importance, but also an opportunity for the Court to clarify that the type of speech at issue here falls squarely outside of the bounds of First Amendment scrutiny.

In its opinion, the Eighth Circuit also correctly noted that this Court has never, until now, had the opportunity to address the government speech issue "in a case involving an agricultural checkoff program."[3] *Livestock Mktg Ass'n*, 335 F.3d at 717. Inexplicably, however, the Eighth Circuit eschewed this Court's precedent, concluding that the government speech doctrine simply could not apply to this case. The fundamental flaw in the court's opinion is its belief that the government speech doctrine cannot protect the

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[3] The Court has in recent years addressed the constitutionality of two agricultural marketing programs, yet it was not able to analyze those programs in the context of a government speech argument. First, in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Court held that mandatory assessments that were used to advertise California tree fruit passed Constitutional muster. Four years later, the Court decided *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), and held that compelled support for mushroom advertising was unconstitutional because, among other things, it was not part of a larger regulatory scheme, as was the case in *Wileman*. *Id.* at 412-13. The Court acknowledged that neither of those cases presented an opportunity to review the government speech doctrine in this context.

government against challenges to the compelled funding of speech, as opposed to challenges directed to the content of speech. According to the Eighth Circuit, the government may permissibly choose to speak about certain issues, it may choose the particular words to say, and it may choose the means by which to convey its message, even though citizens might disagree with that message. However, according to the court, the government may not compel citizens to *fund* speech with which they disagree. This is a distinction that cannot exist, otherwise it will undermine the government speech doctrine. Moreover, the Court ignored the important goals of the Beef Act, the Act's success in achieving those goals, and the important national interests served by the Act. Each of these reasons, when analyzed in light of this Court's prior holdings on government speech, necessitate reversal.

A. The Government Speech Doctrine Applies to Advertising Conducted Pursuant to the Beef Act.

It is well-settled that the First Amendment's freedom of speech guarantee limits the government's right to interfere with private speech, but it does not prevent the government from engaging in its own speech. This Court has held that when the government speaks, "it may make content-based choices . . . [and] it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995). Moreover, the government may fund speech in support of its policies through "taxes or other exactions binding on protesting parties." *Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000). Engaging in speech is necessary in order to address issues of importance to the Nation, and is "but one means that government must have at its disposal to conduct its affairs and to accomplish its ends." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001). Put simply, if the government is not afforded the right to

speak, then it cannot effectively govern. *Keller v. State Bar of Cal.*, 496 U.S. at 12-13 (stating that without government speech, "the process of government as we know it would be radically transformed").

This Court has not yet defined the specific parameters of the government speech doctrine. Nevertheless, the Court's cases provide that the doctrine applies when the government conveys a message in order to further a public goal. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000). It is axiomatic that in order for the doctrine to apply to particular speech, the speech must have been disseminated at the direction of the "government." However, this Court has held that the government may use private entities "to convey [its] governmental message," or "to transmit specific information pertaining to its own program" without implicating the First Amendment. *Rosenberger v. Rector & Visitor of the Univ. of Va.*, 515 U.S. 819, 833 (1995). In spite of this established principle, the Eighth Circuit, in its opinion, considered the extent of the government's responsibility and control over beef advertising and determined "the substantiality of the government's interest [in the Beef Act] to be highly doubtful." *Livestock Mktg Ass'n*, 335 F.3d at 723.

Contrary to the Eighth Circuit's opinion, and as the Third Circuit noted in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), when the Beef Board speaks, it "does so on behalf of the Secretary of Agriculture and the government of the United States." *Id.* at 1132. Specifically, the Beef Act and the Beef Order (which was promulgated by the Secretary of Agriculture) established the Beef Board and the Beef Committee. *See* 7 U.S.C. § 2904(1)-(5); 7 C.F.R. 1260.141-1260.151, 1260.161-1260.169. Members of the Beef Board and Beef Committee are under the direct control of the Secretary of Agriculture, and all budgets, plans or projects proposed by the Board must receive final approval from the Secretary.

See 7 U.S.C. § 2904(1), (4)(C); 7 C.F.R. § 1260.141(b); 7 C.F.R. § 1260.212. The Secretary has the final authority to approve or reject the contents of any and all projects suggested by the Beef Board. (Trial Transcript at 141-42). A Department of Agriculture representative attends every meeting of the Beef Board, the Operating Committee, and the Executive Committee. (Trial Transcript at 205, 215). The Beef Board is required to submit audits of its activities to the Secretary each fiscal period. 7 C.F.R. § 1260.150(a). If the Secretary determines that a proposed checkoff-funded project does not serve the purposes of the Beef Act, the project will not move forward. (Trial Transcript at 192, 312-13). Clearly, the United States government controls all speech communicated pursuant to the Beef Act and, as this Court has held, the fact that the messages might actually be delivered by private individuals under government control is of no consequence to a government speech analysis. *Rosenberger*, 515 U.S. at 833 (holding that the government may communicate through private entities or individuals).

The Eighth Circuit engaged in virtually no analysis of whether the advertising at issue in this case was protected government speech. Rather, departing from this Court's precedent, the court merely held that the doctrine could not even apply to the Beef Act. Specifically, the court created a bright-line distinction where none should exist, concluding that there is a difference between challenges directed to the government's choice of the *content* of its speech, rather than challenges directed to the *compelled funding* of speech. According to the court, the former may constitute protected government speech, while the latter cannot. *Livestock Mktg Association*, 335 F.3d at 720.

The Eighth Circuit's purported distinction is a radical departure from this Court's government speech jurisprudence. Specifically, the Court has clearly established that a fundamental tenet of the government speech doctrine is that the

government may compel the *funding* of speech. *See Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (holding constitutional the use of mandatory student activity fees to fund speech activities); *Keller v. State Bar of Cal.*, 496 U.S. 1, 10-11 (1990) (applying government speech analysis to a case involving mandatory funding of speech). Accordingly, the Eighth Circuit has purported to establish a prohibition on government speech that has been specifically foreclosed by this Court.

The reasoning behind the Eighth Circuit's distinction is necessarily flawed, otherwise the government speech doctrine would be rendered meaningless. If the Eighth Circuit's purported distinction were valid, then anyone who disagrees with a message disseminated by the government could successfully challenge that message on First Amendment grounds by simply attacking the funding of the message, rather than its content. This would certainly bode ill for numerous other government programs that rely on government speech to convey messages of national importance. By way of example, courts would hardly entertain lawsuits brought by taxpayers who disagree with the government's funding of its anti-smoking campaign, or its advertisements imploring young adults to "be all you can be" in the United States Army or to join "The Few, The Proud, The Marines." By striking down the generic advertising campaign at issue here, the Eighth Circuit's precedent threatens to eviscerate the government speech doctrine. This is an issue of utmost importance to the Associations, their members, and all others similarly situated.

A Federal district court opinion has upheld application of the government speech doctrine to the Beef Act and the Beef Checkoff program. *See Charter v. USDA*, 230 F. Supp. 2d 1121 (D. Mont. 2002), *appeal docketed*, No. 02-36140 (9th

Cir. Dec. 24, 2002).[4] In reaching its conclusion, the *Charter* court held that other cases, much like the underlying opinion, which have held that commodity marketing programs are not protected by the government speech doctrine were based upon "misplaced" analyses. *Id.* at 1131. Analogizing the administration of the Beef Act to the Court's most recent pronouncements on government speech, including *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-03 (2000), the *Charter* court arrived at the logical conclusion that "if pre-game prayer was government speech, then 'Beef. It's what's for dinner' must be."[5] *Id.* at 1135. This reasoning, which is consistent with this Court's prior holdings, demonstrates that the government speech doctrine should apply to the Beef Act.

B. Advertising Conducted Pursuant To The Beef Act Is Government Speech Because It Furthers Legitimate Government Goals.

This Court has held that as long as the government bases its speech on legitimate goals, it may do so without implicating First Amendment concerns. *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990). As discussed above, allowing the government to take positions on matters of national importance is necessary for an effective government. As the district court in *Charter* noted, "to effectively govern, [the government] must take substantive positions and decide disputed issues. So long as it bases its actions on legitimate goals, the government may speak despite citizen disagreement with the content of the message." *Charter*, 230 F. Supp.

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[4] This case is currently on appeal to the Ninth Circuit Court of Appeals.

[5] Although the *Charter* court held that the government speech doctrine was applicable, it was of the opinion that the commercial speech test set forth in *Central Hudson* did not apply to the Beef Checkoff. *Id.* at 1141. Nevertheless, the court concluded that, assuming the commercial speech test did control the case, the checkoff-funded program "passes constitutional muster." *Id.*

2d at 1129 (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990)). According to this Court, one of the most important things to look at when determining whether speech qualifies as "government speech" is whether the speech is communicated "explicitly for the furtherance of federal government goals." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). In holding the Beef Act unconstitutional, the Eighth Circuit completely overlooked the compelling reasons for the existence of the government speech doctrine, it ignored Congress' goals with respect to the Beef Act and similar legislation, and it failed to sufficiently acknowledge the positive effects that the Beef Act and other commodity marketing programs have had upon agriculture in the United States, and upon the members of the Associations.

To understand Congress' reasons for enacting the Beef Act, it is helpful to analyze the reasons why the promotion, education, and research fostered by the Act is necessary for the beef industry. Throughout American history, the beef industry has faced its share of adversity—including everything from national beef boycotts and "eat less beef" campaigns to concerns about BSE, *e-coli*, and other health issues. Recognizing the need to combat such issues, the cattle industry organized the National Live Stock and Meat Board ("Meat Board") in 1922, which was the "first coordinated voice of the livestock and meat industry." *See* Dr. Herrell De Graff, *Report and Recommendations of the Program and Policy Study Committee to the Directors of the Meat Board* (January 18, 1962) at 1. The goals of the Meat Board were based, in part, on the belief that "a vigorous livestock agriculture is necessary . . . to a stable agricultural economy [and] to the proper nutrition and health of the consuming public . . . ." *Id.* (Meat Board Creed).

The checkoff system of funding originated with the Meat Board. The early checkoff program, however, was based entirely upon voluntary contributions and, as such, was

ultimately unable to meet its goals of promotion, research, and education. *See* Steve Dittmer, *A Voluntary Checkoff Might Surprise the Industry*, CALF NEWS (April/May 2004) at 26. Accordingly, the industry began pursuing legislation to establish a national, mandatory beef checkoff program. *Id.* When the first version of what ultimately became the Beef Act was proposed to Congress in 1975, it was correctly characterized not as a request for government money or aid, but as "a self-help program" in which "the cattlemen would spend their own money on research projects relating to nutrition, human health, new beef products, marketing and distribution." *See BDT Backgrounder*, Sep. 1, 1976, at 3-4. Those goals have remained unchanged to this day.

As the Third Circuit Court of Appeals noted in *United States v. Frame*, 885 F.2d 1119, 1133 (3d Cir. 1989), prior to the Beef Act's passage, "[w]idespread losses and severe drops in the value of inventory [drove] many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether." *Id.* at 1134 (citing Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., 1st Sess. 2-3 (1975)). At that time, Congress was of the opinion that a continuation of this deterioration of the beef industry would endanger not only the country's meat supply, but "the entire economy." *Id.* The Beef Act's preamble embraces those concerns, declaring that "the production of beef and beef products plays a significant role in the Nation's economy" and the maintenance and expansion of "markets for beef and beef products are vital to the welfare of beef producers . . . as well as to the general economy of the Nation." 7 U.S.C. § 2901(a)(2),(4). The Beef Act as it exists today was passed in 1985, and the Beef Checkoff was established by the vote of a significant majority of American cattlemen. *See* Steve Dittmer, *A Voluntary Checkoff Might Surprise the Industry*, CALF NEWS (April/May 2004) at 26.

The Beef Act and the Beef Checkoff program have, in large part, succeeded in achieving Congress' goals. According to Cattle-Fax, a beef marketing information service, the beef industry provides $190 billion of total value to the United States economy. Studies have shown that activities including promotional efforts conducted under the Beef Act successfully "halted a 20-year beef demand erosion" in this important sector of the Nation's economy. Rod Smith, *Industry Officials See Domino Effect*, FEEDSTUFFS, Aug. 13, 2001, at 1. By way of example, studies indicate that as recently as July of 2004, eighty-seven percent of consumers recognized the popular "Beef, It's What's for Dinner" slogan. *See Beef Checkoff Talking Points*, NATIONAL CATTLEMEN'S BEEF ASS'N, July 7, 2004. Moreover, over 1,600 persons per day visit the newly launched website, www.beefitswhatsfordinner.com, and each of those persons spends an average of approximately seven minutes per visit learning more about beef and the nutritional aspects of beef products. The Beef Checkoff promotes American beef in approximately 80 foreign countries, and since the Beef Act's passage, United States beef and beef product exports have risen by more than 300 percent in volume and nearly 400 percent in value. *Id.* Consumer surveys performed since the widely-publicized case of BSE arose in the United States indicate that, while awareness of BSE remains high, "consumers still understand that beef is safe to eat." *Id.*

Independent analyses have confirmed the Beef Act's success. Ronald W. Ward, a professor of Food and Resource Economics, and a leading expert on the Beef Checkoff's impact on the beef industry, has concluded, in a number of publications, that the program has been an overwhelming triumph.[6] Specifically, Mr. Ward's peer-reviewed statistical

[6] Ronald Ward was designated as an expert witness in the underlying case before the district court. In his report, which was submitted to the court for consideration, Ward echoed the results of his analyses discussed

models demonstrate that the program has had "a positive and statistically significant impact on the retail purchases of beef," and that "the checkoff is shown to attract new consumers to the beef market." Ronald W. Ward, *Beef Demand and Its Response to the Beef Checkoff*, UNIVERSITY OF FLORIDA BEEF SHORT COURSE, May, 3, 2001, at 40. Moreover, in spite of factors such as health concerns which "put a downward pressure on beef demand," empirical models demonstrate that "the beef checkoff has had a positive and statistically significant influence on" the number of servings of beef consumed in the United States. Ronald W. Ward, *Evaluating the Beef Promotion Checkoff*, NICPRE QUARTERLY, Fourth Quarter 1998, at 1.[7] As early as 1993, only eight years after the Beef Act's passage, the Beef Checkoff program yielded a return to producers of $5.714 net dollars for each $1.00 assessment collected. Ronald W. Ward & Chuck Lambert, *Generic Promotion of Beef: Measuring the Impact of the US Beef Checkoff*, JOURNAL OF AGRICULTURAL ECONOMICS, 44:456-466, 1993, at 464. Those figures have remained consistent ever since. *See* Ronald W. Ward, *Beef Demand and Its Response to the Beef Checkoff*, UNIVERSITY OF FLORIDA BEEF SHORT COURSE, May, 3, 2001, at 42 (estimating a return of 5.67 for every dollar assessed in 2001).

The enormous benefit that the Beef Checkoff and similar commodity marketing programs can provide to members of the Associations may be understood through a simple

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herein, and concluded that "[c]laims that the [checkoff] does not have a measurable impact are simply not supported by the statistical evidence." In his opinion, "from extensive evaluation of the beef programs over several years is that the programs have had a positive economic impact on the demand for beef and that impact can be measured with statistical confidence."

[7] This publication is available at http://commodity.aem.cornell.edu/nicpre/newslet/vol4no4.

example. In the United States, there are approximately 831,000 beef cowherds, yet eighty percent of those herds have less than fifty head of cattle. *See* Dan Otto & John D. Lawrence, *Economic Impact of the United States Beef Industry*, at http://www.beef.org (last visited July 27, 2004). Certainly, a rancher with fifty head of cattle would not have access to major media outlets, and could not fund an advertising campaign with anywhere near the reach provided by promotions funded with checkoff dollars. However, by contributing a modest assessment of $1.00 for each head of cattle sold (which, in this example would amount to no more than $50.00 a year), that rancher benefits from a nationwide television, radio, and print advertising campaign which, as discussed above, has been statistically proven to reward that rancher with a greater than five-to-one return on his or her contribution. Moreover, the rancher will benefit from the numerous research activities conducted with checkoff proceeds, as well as the provision of consumer information and education to the public, all of which serve to strengthen the beef industry and the Nation's economy. However, the Eighth Circuit's opinion would deprive these individual cattlemen and women of the proven benefits and protection that the Beef Act has afforded them.

Obviously, the government's goals in promoting and protecting the beef industry are legitimate. Based on the foregoing, it is clear that the Beef Act accomplishes its stated goals and is, therefore, constitutional under the government speech doctrine. *See Lebron*, 513 U.S. at 397 (stating that government speech is that which is communicated for the furtherance of government goals). Moreover, advertising and other activities funded by the Beef Checkoff and other commodity marketing programs go a long way toward ensuring that members of the Associations maintain their traditional way of life. *See* 121 Cong. Rec. H31436 (1975) (statement of Rep. Railsback) (stating that this is a fundamental purpose of the Beef Act). By denying the government's

right to communicate regarding these important issues, the Eighth Circuit has effectively denied the very existence of the government speech doctrine.

C. The Government Speech At Issue In This Case Concerns Matters Of National Importance.

The Beef Act was passed in order to advance a "compelling state interest," and to "prevent[] the collapse of a vital sector of the national economy." *Frame*, 885 F.3d at 1134 n. 12. As discussed above, the Beef Act has undeniably succeeded in accomplishing that purpose. The necessity of addressing issues of such importance to the Nation is but one reason the government speech doctrine exists. The Eighth Circuit's opinion now threatens to eliminate the benefits achieved by the Beef Act, which will likely plunge the cattle industry back into the downward spiral that necessitated the creation of the Act in the first place. *See, e.g.*, Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., lst Sess. 3; 121 Cong. Rec. H31439 (1975) (stating that continuation of the downward trend in the cattle industry "would endanger not only the country's meat supply, but the entire economy"). The Eighth Circuit paid no attention to the important interests served by the Beef Act, and it did not consider the devastating effect that striking down the Beef Act would have on the beef industry and the Nation as a whole.

The most glaring oversight in the Eighth Circuit's opinion is that it ignored the fact that the Beef Act is not geared solely towards advertising. An important component of the Act is that it funds research, consumer information, and educational projects, some of which concern important food safety issues and other matters of importance to the beef industry and the Nation as a whole.[8] *See, e.g.* Trial Transcript at 198, 247-48,

[8] This is but one additional use of checkoff proceeds. Funds are also used to provide the public with important consumer information and

299-301. Each year, approximately $2 million in checkoff funds are invested in food safety research and technology which is geared toward, among other things, reducing the risks of food contamination and understanding and eradicating diseases such as BSE. *See Beef Checkoff Talking Points*, NATIONAL CATTLEMEN'S BEEF ASS'N, July 7, 2004. For instance, in its 2003 Research Annual Report, the Federation of State Beef Councils reported that checkoff dollars were used to determine better ways to detect food-borne pathogens such as *E. coli*, to study new methods of beef product enhancement, to study the positive health attributes of beef, to fund new product development research, and to implement new strategies for BSE research.[9] In an era of increased public concern regarding significant health issues such as *E. coli*, BSE[10], and foot-and-mouth disease, one of the most important functions of the Beef Act is to ensure that "America's beef remains safe for consumers." *See, e.g.* http://www.bseinfo.org (last visited August 4, 2004) (providing an information resource on BSE, which is funded, in part, by assessments under the Beef Act). These aspects of the Beef Act demonstrate that it is vitally important to the Associations and to the United States as a whole.

In the absence of the national Beef Checkoff, these important activities will not continue without funding by way

education regarding numerous issues surrounding beef and beef products. *See, e.g.* www.beefitswhatsfordinner.com (last visited July 28, 2004).

[9] The Research Annual Reports are available at http://www.beef.org (last visited August 4, 2004). The matters discussed in this Brief were obtained from the 2003 Research Annual Report, which is the most current version. Although the 2003 report is not yet available via the above web-link, it may be obtained from the Federation of State Beef Councils, a division of the National Cattlemen's Beef Association.

[10] Research, prevention, and education efforts directed at BSE are particularly important and timely given the attention focused on the discovery of a BSE-infected dairy cow in Washington State.

of state programs, private contributions, or taxpayer dollars.[11] Currently, only 28 states have implemented legislated checkoff programs, and only 25 of those programs would automatically go into effect if the Eighth Circuit's opinion were affirmed. Most of those state programs contain provisions allowing for refunds from assessments which will undoubtedly result in "free-riders" who will reap the benefits of the promotional programs without paying for them. The revenues generated by the state programs will be significantly less than those generated by the national checkoff; in fact, current estimates are that state programs will only generate 40-45% of the revenues generated by the national Beef Checkoff.

Without the revenues generated by the national program, the promotional, research, and educational activities fostered by the Beef Act could not continue at their present levels. As evidenced by the failed voluntary checkoff that led, at least in part, to the implementation of the Beef Act, reliance upon voluntary efforts and funding from other sources will not achieve the revenues necessary to run national promotional campaigns or to continue the research efforts that ensure United States beef remains the best and safest in the world. *See* Steve Dittmer, *A Voluntary Checkoff Might Surprise the Industry*, CALF NEWS (April/May 2004) at 26-27. The likely result of striking down the Beef Act will be that the industry will become unable to remain proactive in its efforts to increase beef demand, ensure product safety, and educate the public. Rather, the industry will be forced to become *reactive* because funds will necessarily be prioritized toward addressing significant and pressing issues when they occur—such as the recent case of BSE in Washington State. The only potential solution to this considerable problem would be

[11] As mentioned above, when the first version of what ultimately became the Beef Act was proposed, it avoided requests for public funding and was properly characterized as a "a self-help program" for American cattlemen. *See BDT Backgrounder*, Sept. 1, 1976 at 3-4.

to divert large amounts of tax dollars from other programs in order to maintain the important activities currently funded with Beef Checkoff assessments.

An example of the potential impact that striking down the Beef Act would have upon the cattle industry can be seen through an analysis of the United States sheep industry. The National Wool Act of 1954 once funded promotional activities for that industry. *See* 7 U.S.C. § 1781, *et. seq.* (repealed). However, in 1993, the Senate approved a three-year phaseout of the Wool Act, and the act was completely eliminated by 1996. *See* Rod Fec, *Chasing the Checkoff*, SUCCESSFUL FARMING, Jan. 1999. The sheep industry then found itself without the funding mechanisms prescribed by the act. In order to continue its promotional efforts, the industry implemented a checkoff program, but the results of the referendum were successfully challenged, and the checkoff did not go into effect. *See USDA Invalidates Checkoff Vote*, NATIONAL LAMB & WOOL GROWER, June 1996. This left the United States sheep industry with no means to promote itself nationally and little means to compete against imported lamb and the mandatory checkoff funded programs of Australia and New Zealand. *See* Jim Gransbery, *Sheepmen Find Survival Difficult in Global Market*, THE BILLINGS GAZETTE, Dec. 6, 1998. The situation worsened to the point that, in July of 1999, the United States government was forced to take drastic measures, including implementing trade laws, initiating temporary tariff rate quotas on imports, and making a $100 million lamb meat adjustment assistance package available to the sheep industry. *See New Tariffs Will Boost Price of Lamb*, CNN, July 8, 1999. Moreover, the United States action included benchmarks to measure the competitiveness of the domestic lamb industry. The first such benchmark sought to "[e]valuate the effort and success of the industry to put forth a coordinated and comprehensive strategy for market development; and the industry's utilization of any future checkoff program or other

program using industry funds for generic lamb promotion." *Lamb Meat*, U.S. Int'l Trade Comm'n Publication 3389, January 2001. In early 2002, the United States sheep industry initiated an American lamb checkoff program under the generic authority for commodity checkoff programs authorized in the 1996 Farm Bill.

As evidenced by their participation in this *amicus* brief, the Associations are concerned about the future of the cattle industry, and United States agriculture as a whole, in the wake of the Eighth Circuit's opinion. As indicated above, the Beef Act has undeniably had a positive impact on the Nation's agricultural economy. Because of the enormous benefits achieved as the result of checkoff-funded programs, approximately 75% of beef producers are in favor of the Beef Act and the continuation of the Beef Checkoff program. *See* Lynn Cornwell, *No More Favors, Please!*, BEEF, at http://beef-mag.com/ar/beef_no_favors_please (Jan. 1, 2002). The Eighth Circuit ignored the potential effects that its holding would have upon the thousands of entities and individuals, including many of the Associations and their members, that are in favor of the Beef Act and similar legislation. Accordingly, its judgment should be reversed.

D. The Importance of the Legislation at Issue is Underscored By the Existence of Similar Programs in Other Industries.

The importance of this case is not confined to the beef industry. This brief is submitted on behalf of organizations representing agricultural interests throughout the entire United States. There are 113 *amici* participating in this brief, and those entities represent individuals involved with virtually every agricultural commodity in the United States. The *amici* include the American Farm Bureau Federation, twenty-six state farm bureau organizations, numerous state and national entities involved in various aspects of the cattle beef industry, and entities specifically related to industries

other than beef, including: Soybeans, sheep, mushrooms, emus, watermelons, and cotton ginning. Every one of the participants in this brief represent individuals who have directly benefited from the promotional, research, and educational activities conducted pursuant to either the Beef Act or other commodity marketing programs.

Commodity marketing programs are an important part of America's agricultural economy. Such programs are credited with preserving the traditional way of life of American farmers, ranchers, and others involved in various agricultural pursuits. Additionally, like the Beef Act, many of these programs carry out important non-advertising functions, including research, education, and consumer awareness. The importance of these programs to the United States economy was reaffirmed in 1996 with the passage of the Federal Agricultural Improvement and Reform Act. *See* 7 U.S.C. § 7401, *et. seq.* In connection with that act, Congress specifically found that "it is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets . . . through industry-funded, Government-supervised, generic commodity promotion programs . . . ." 7 U.S.C. § 7401(b)(1). Currently, there are numerous such national programs in effect,[12] which are engaged in the promotion of many commodities.[13]

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[12] Some of the commodities promoted pursuant to national acts include: Cotton (7 U.S.C. §§ 2101-18); Potatoes (7 U.S.C. §§ 2611-27); Eggs (7 U.S.C. §§ 2701-18); Dairy Products (7 U.S.C. §§ 4501-13); Pork (7 U.S.C. §§ 4801-19); Wheat (7 U.S.C. § 3401-3410); Flowers (7 U.S.C. §4301-4319); Watermelon (7 U.S.C. § 4901-4916); Mushrooms (7 U.S.C. § 6101); Soybeans (7 U.S.C. § 6201-6212); Milk (7 U.S.C. § 6301-6310); Sheep (7 U.S.C. § 7101-7111); Canola and Rapeseed (7 U.S.C. § 7441-7452); Popcorn (7 U.S.C. § 7481-7491); Hass Avocados (7 U.S.C. § 7801-7813); Blueberries (7 U.S.C. § 7441-7425); and Peanuts (7 U.S.C. § 7441-7425).

[13] Examples of some familiar advertising under some of these acts include "Got Milk?" and the popular milk moustache print ads; "Pork:

The Beef Act is not the only commodity marketing program to have recently fallen under scrutiny. For instance, in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed sub. nom. Veneman v. Campaign for Family Farms*, 72 U.S.L.W. 3539 (U.S. Jan. 20, 2004), the Sixth Circuit held that the Pork Promotion, Research and Consumer Information Act of 1985 violated the First Amendment. Similarly, in *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 429, n. 12 (5th Cir. 2004), the Fifth Circuit held that mandatory assessments imposed to fund generic advertising of alligator products violated the First Amendment.[14] The dairy product checkoff was held unconstitutional in *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), and advertising for California Table Grapes was held to violate the First Amendment in *Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895, 899-900 (9th Cir. 2003). Finally, in *In re Washington State Apple Advertising Comm'n*, 257 F. Supp. 2d 1290, 1305 (E.D. Wa. 2003), it was held that mandatory assessments used to fund advertising of Washington State apples were not protected by the government speech doctrine.

The Associations are concerned about the proliferation of litigation over the constitutionality of commodity marketing programs such as the Beef Act. As discussed previously,

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The Other White Meat"; "The Incredible, Edible Egg"; and "The touch . . . the Feel of Cotton . . . the Fabric of Our Lives." *See, e.g., Cochran v. Veneman*, 359 F.3d 263, 266 (3d Cir. 2004); *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 162 n. 2 (6th Cir. 2003); *petition for cert. filed sub. nom. Veneman v. Campaign for Family Farms*, 72 U.S.L.W. 3539 (U.S. Jan. 20, 2004) (No. 03-1043).

[14] Although the Fifth Circuit ultimately held that the particular marketing at issue in *Pelts & Skins* did not constitute government speech, the court opined that "[t]he Supreme Court's treatment of compelled subsidy challenges convinces us that the government speech doctrine is *at least potentially applicable* to this general category of cases." *Id.* at 429-30, n. 13.

programs such as the one at issue in this case are vitally important to American agriculture and to the economy as a whole. This Court should clarify that promotional activities conducted pursuant to the Beef Act are not subject to First Amendment scrutiny, and it should reverse the judgment below.

II. ADVERTISING CONDUCTED PURSUANT TO THE BEEF ACT IS CONSTITUTIONAL UNDER THE COMMERCIAL SPEECH DOCTRINE.

After finding the government speech doctrine inapplicable to the case at hand, the Eighth Circuit purported to apply the test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *See Livestock Mktg Ass'n*, 335 F.3d at 722. Although *Central Hudson* and its progeny have clearly outlined three specific factors for determining whether commercial speech survives First Amendment scrutiny, the Eighth Circuit did not directly apply them. Rather, the court purported to "adapt" the *Central Hudson* factors to the particular circumstances of this case by applying a "balancing test," and concluded that the government's interest in protecting and preserving the beef industry was not sufficiently substantial to justify infringing upon the complaining parties' rights through generic advertising. *Id.* at 723-725. Because the Eighth Circuit's unprecedented test has no foundation in the law of commercial speech, and because proper application of the *Central Hudson* analysis yields a finding that the Beef Act is constitutional, the Eighth Circuit's judgment should be reversed.[15]

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[15] Even under the "balancing test" articulated by the Eighth Circuit, the Beef Act withstands scrutiny. As discussed herein, the Eighth Circuit's conclusion that the government's interest in beef promotion is not "sufficiently substantial to justify the infringement on [Respondents'] First Amendment free speech right" ignores the government's compelling

Under *Central Hudson*, commercial speech withstands First Amendment scrutiny if it: (1) furthers a substantial government interest; (2) directly advances that interest; and (3) is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. In *United States v. Frame*, 885 F.2d 1119, 1133 (3d Cir. 1989), the Third Circuit engaged in a straightforward application of the *Central Hudson* factors to the Beef Act. The court held that, among other things, the "national interest in maintaining and expanding beef markets [is] compelling." *Frame*, 885 F.2d at 1134. The court further found that the Beef Act directly advances that interest by "preventing further decay of an already deteriorating beef industry," which "would endanger not only the country's meat supply, but the entire economy." *Id.* at 1134. Finally, the court was of the opinion that the generic and non-ideological advertising conducted under the Beef Act was not more extensive than necessary to accomplish its goals, and that any intrusion upon the rights of the complaining party was slight, especially given the fact that the advertising generically "promote[s] the product that the defendant himself has chosen to market." *Id.* at 1135-36.

The Third Circuit's application of *Central Hudson* yielded the correct result. As discussed previously, promotional activities conducted pursuant to the Beef Act unquestionably further substantial government interests. In fact, the preamble of the Beef Act illustrates the substantiality of the government's interest, insofar as it acknowledges that "markets for beef and beef products are vital to the welfare of beef producers . . . as well as to the general economy of the Nation." 7 U.S.C. § 2901(a)(2),(4). The fact that beef advertising, research, and educational activities conducted pursuant to the Act directly advance the government's interest

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interests in protecting the beef industry, strengthening the agricultural economy, and ensuring the health of the American public. *Livestock Mktg Ass'n*, 335 F.3d at 726.

is likewise without question. Promotion of beef has increased public consumption of beef and has rewarded beef producers with a tremendous return on their investment. *See, e.g.* Ronald W. Ward, *Beef Demand and Its Response to the Beef Checkoff*, UNIVERSITY OF FLORIDA BEEF SHORT COURSE, May, 3, 2001, at 42 (estimating a return of 5.67 for every dollar assessed in 2001). Finally, the beef advertising at issue is certainly no more extensive than necessary to accomplish the government's goals. It can hardly be said that the generic, non-ideological slogan "Beef, It's What's for Dinner" unnecessarily intrudes on the Respondents' rights—especially given the fact that it promotes the very product Respondents have chosen to market. *See Frame*, 885 F.2d at 1135-36. Accordingly, because promotion of beef pursuant to he Beef Act survives the intermediate scrutiny of *Central Hudson*, the judgment of the Eighth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, as well as those addressed in the Petitioners' briefs on the merits, the judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici*

1. American Farm Bureau Federation
2. Alabama Cattlemen's Association
3. American Angus Association
4. American Chianina Association
5. American Emu Association
6. American Gelbvieh Association
7. American Hereford Association
8. American Highland Cattle Association
9. American Mushroom Institute
10. American National CattleWomen
11. American Sheep Industry Association
12. American Simmental Association
13. American Soybean Association
14. American Veal Association
15. American-International Charolais Association
16. Arizona Cattle Feeders Association
17. Arizona Cattle Growers Association
18. Arizona Farm Bureau
19. Arizona State CowBelles
20. Arkansas Cattlemen's Association
21. Arkansas CattleWomen
22. Arkansas Farm Bureau
23. California Cattlemen's Association

24. California CattleWomen
25. Colorado Cattlemen's Association
26. Colorado CattleWomen
27. Colorado Livestock Association
28. Florida Cattlemen's Association
29. Florida Farm Bureau
30. Georgia Cattlemen's Association
31. Georgia CattleWomen
32. Hawaii Cattlemen's Council
33. Hawaii Farm Bureau
34. Idaho Farm Bureau
35. Illinois Beef Association
36. Illinois Farm Bureau
37. Independent Cattlemen's Association of Texas
38. Indiana Beef Cattle Association
39. Indiana Farm Bureau
40. Iowa Cattlemen's Association
41. Iowa Farm Bureau
42. Kansas Farm Bureau
43. Kansas Livestock Association
44. Kentucky Cattlemen's Association
45. Kentucky Farm Bureau
46. Louisiana Cattlemen's Association
47. Louisiana Farm Bureau
48. Maryland Cattlemen's Association

49. Michigan Cattlemen's Association
50. Michigan Farm Bureau
51. Minnesota Cattlemen's Association
52. Minnesota CattleWomen
53. Minnesota Farm Bureau
54. Mississippi Cattlemen's Association
55. Mississippi Farm Bureau
56. Missouri Cattlemen's Association
57. Missouri CattleWomen
58. Montana Farm Bureau
59. Montana Stockgrowers Association
60. National Cotton Ginners Association
61. National Watermelon Association
62. Nebraska CattleWomen
63. Nebraska Farm Bureau
64. Nevada Cattlemen's Association
65. Nevada CattleWomen, Inc.
66. New Mexico Cattle Growers Association
67. New Mexico CowBelles
68. New Mexico Farm Bureau
69. New York Beef Producers Association
70. New York Farm Bureau
71. North Carolina Cattlemen's Association
72. North Carolina CattleWomen
73. North Carolina Farm Bureau

74. North Dakota CattleWomen
75. North Dakota Farm Bureau
76. North Dakota Stockmen's Association
77. Ohio Cattlemen's Association
78. Ohio Farm Bureau
79. Oklahoma Cattlemen's Association
80. Oklahoma CattleWomen
81. Oregon Cattlemen's Association
82. Oregon CattleWomen
83. Oregon Farm Bureau
84. Pennsylvania Cattlemen's Association
85. Pennsylvania Farm Bureau
86. Pennsylvania Livestock Association
87. South Carolina Cattlemen's Association
88. South Carolina Farm Bureau
89. South Dakota Cattlemen's Association
90. South Dakota Cattlemen's Auxiliary
91. South Dakota CattleWomen
92. South Dakota Farm Bureau
93. Southeastern Livestock Exposition
94. Tennessee Cattlemen's Association
95. Texas & Southwestern Cattle Raisers
96. Texas Cattle Feeders Association
97. Texas CattleWomen
98. Texas Farm Bureau

99. Texas Longhorn Breeders Association of America
100. U.S. Meat Export Federation
101. Utah Cattlemen's Association
102. Utah CattleWomen
103. Virginia Cattlemen's Association
104. Virginia Farm Bureau
105. Washington Cattle Feeders
106. Washington Cattlemen's Association
107. Washington State CattleWomen
108. West Virginia Cattlemen's Association
109. Wisconsin Cattlemen's Association
110. Wisconsin Farm Bureau
111. Wisconsin Veal Growers Association
112. Wyoming CattleWomen, Inc.
113. Wyoming Stock Growers